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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. ———

PEARL DETENBER, Administratrix of the Estate of TERRY DETENBER, Deceased, and VIOLA B. TOWNSEND, Administratrix of the Estate of RICHARD MATTINGLY, Deceased, - - - - - - - - *Petitioners,*

v.

AMERICAN UNIVERSAL INSURANCE COMPANY, - - - - - - - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

American Universal Insurance Co., Respondent herein, prays that the request for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on February 9, 1967, be denied.

I. CITATION TO OPINIONS BELOW.

The judgment of the District Court is unreported and is printed in the Petitioners Appendix "B", pages 19-21. The opinion of the United States Court of Appeals is printed in the Petitioners Appendix "A", pages 12-18 and is reported as Detenber v. American Universal Insurance and Townsend v. American Universal Insurance. (C. A. 6th), 372 F. (2) 50.

II. JURISDICTION.

The jurisdiction of this Court is sought pursuant to the provisions of 28 USCA 1254(1).

III. QUESTIONS PRESENTED.

1. May Petitioners raise questions of law in this Court which were raised for the first time upon petition for rehearing in the Appellate Court and never raised in the District Court?
2. Does the judgment of the Court of Appeals affirming the judgment of the District Court violate Rule 56(c) of the Federal Rules of Civil Procedure?

IV. RULES INVOLVED.

The rule involved in this appeal is Rule 56(c) of the Federal Rules of Civil Procedure, which is printed in Petitions Appendix C at page 21.

V. COUNTER-STATEMENT OF CASE.

Two actions for wrongful death and one for personal injury involving three teen-age passengers in the automobile of Michael Clark were instituted in the state court in Kentucky. The collision resulting in the fatalities and injury took place at an intersection in Louisville, Kentucky, and involved Clark's car and a bus of the Louisville Transit Company. Plaintiffs in the state court action, Petitioners here, sought to recover against both Clark and the bus company. The testimony in the state court action introduced by the plaintiffs and the transit company may be summarized as follows:

About 7:30 p.m. on a rainy Saturday night in 1961, 18 year-old Clark and three younger companions went to the home of Clark's cousin, Patty Ross, to meet Patty and another young lady for an evening's entertainment. The girls were not ready when the young men arrived and Clark and his three friends drove to a liquor store and "were gone something like an hour" (R. 24b). The boys had an "older fellow" purchase some alcoholic beverages of a disputed quantity. Clark testified that this person "purchased us a half-pint of whiskey" (R. 48a). In a written statement signed by Clark five days after the accident, Clark related "we had an older fellow get us a six-pack of beer and a half-pint of gin at a bar" (R. 54a). One of the other boys recalled the purchase of the liquor and of drinking some of it (R. 64b). The injured plaintiff, Patty Ross, saw the half-pint whiskey bottle when she got in the car

(R. 57b). Police officers at the scene of the fatal collision found in the car the half-pint bottle of whiskey and one can of beer unopened (R. 87a-88a). The boys opened the whiskey where they purchased it and mixed it with coca-cola (R. 25b), and drove around drinking the gin and beer (R. 54a). Upon returning to the home where the girls were the six young people departed, with Clark driving, "to just ride around awhile" (R. 54a). The Clark automobile proceeded through the west end of Louisville and on Hale Street, about nine blocks from the scene of the fatal collision, some sort of collision occurred (R. 50a). Clark's version of this first collision was that an oncoming car crowded him into a protective horse at a hole being dug in the street and "he scraped the side of the car or something". Clark slowed and looked back but did not stop, "there didn't seem to be no damage" (R. 26b-27b). Bonnie Patterson said "we kinda jerked you know—I just thought it was where the road was torn up or something" (R. 61b). David Oursler recalled something which felt like a big bump in the street and learned later that Clark had hit a parked car. Three witnesses to the hit and run accident testified about the collision, the noise it created and the damage to the parked car of $149.00 (R. 88b-91b).

The Clark car proceeded after the hit and run collision to the intersection of Hale and 34th Street where it collided with the transit company bus, and, as a result of this collision, Terry Detenber and Richard Mattingly were killed and Patty Ross was injured. Clark testified at the trial that he stopped at the stop sign

making a complete stop (R. 51a), however, in a signed statement which Clark gave five days after the accident he said he didn't remember what happened and couldn't even place the intersection but knew there was a stop sign at Hale Street and he made a complete stop (R. 55a). Passenger Oursler in a statement given shortly after the collision stated "I am sure Michael did not make the boulevard stop at 34th Street" (R. 82a-83a). Bonnie Patterson in a statement given shortly after the accident stated "when we arrived at the intersection of 34th and Hale, Mike did slow down but did not make an attempt to stop (R. 63b). At the trial she could not remember whether the car came to a complete stop (R. 61b). Thus the two living occupants of the Clark car with any knowledge about the accident repudiated Clark's testimony about observing the boulevard stop. The only impartial eye-witness to the fatal collision who was forty feet from the intersection when the Clark car passed him driving at fifty miles per hour was Van McCray, who testified that Clark "run that boulevard stop there" (R. 92b). This witness was not permitted to testify at the trial because of a ruling by the trial Judge involving an agreement between counsel relative to supplying each other with the names of witnesses pre-trial. However, this testimony, until it was finally ruled out was a continuous spectre in the seven-day trial that necessarily influenced the thinking and judgment of insurance company's counsel in asserting the defense of assumed risk. A veteran police Officer, Sgt. Maupin, who in-

vestigated the accident testified catagorically that the driver Clark was intoxicated (R. 44b-52b).

After the fatal collision, Clark employed as his personal attorney, Hon. Frank E. Haddad, Jr., President of the Louisville Bar Association and a member of the Bar of the Supreme Court of the United States to represent him in criminal actions instituted against him, and to represent him in the civil actions for wrongful death and personal injury. The criminal case was disposed of before the civil actions were brought on for trial. Clark on the advice of his personal counsel, entered a plea of guilty to the offense of negligent homicide and upon his plea of guilty the facts of the case were presented to the Court without a jury and Clark was found guilty of negligent homicide and placed on probation for a period of three years (R. 57a-59a). The transit company introduced the judgment and the plea of guilty in evidence as was permitted by Kentucky law. Insurance Company counsel and Clark's personal counsel discussed with Clark the import of the introduction in evidence of the judgment and plea of guilty and counseled with Clark about his right to explain his plea (R. 63a). Young Clark suggested that he testify in explanation of his plea of guilty "that he didn't know what happened in his criminal case" (R. 120b). Mr. Haddad, Clark's counsel, as an honorable man, rejected this explanation because it was not true (R. 120b). Personal counsel and Insurance Company counsel concluded after the discussion with Clark and before the judgment of conviction was introduced, that

Clark's purported explanation was not honest or right and they rejected this explanation (R. 120b-124b).

The answer filed by the bus company in the state court consisted of a plea that the collision was brought about solely by the negligence of Clark and in addition thereto the transit company pleaded that the passengers should be barred from recovery on the ground that they assumed the risk of the injuries they sustained by knowingly riding with Clark, while intoxicated, and in continuing to remain in the car after the reckless hit and run incident. In addition, the bus company sought to recover from Clark on a cross-claim for the substantial damage to its bus. Clark's answer constituted a general denial and an allegation that the bus company's negligence was the sole cause of the collision. However, eight months before the trial of the action, Clark's insurance company counsel advised Mr. Haddad, personal counsel for Clark, that insurance company counsel believed that Clark had a good defense on the theory of contributory negligence (R. 111b-113b). On the morning of the first day of the trial, an amended answer was filed by insurance company counsel specifically pleading the defense of assumed risk or contributory negligence and a copy of this pleading was delivered to Clark's personal counsel as well as all other counsel in the case. Mr Haddad testified in his deposition in the District Court, that he knew the defense was available and that based upon the transcript of evidence in the Police court any attorney would have to say that the defense was available (R. 114b).

Clark's insurance company, long before the actual trial of the state court action, and continuously up to and throughout the trial of the action offered to pay the total limits of its insurance policy on behalf of Clark to secure a release from any further liability on Clark's part (R. 17b). The state Trial Court directed a verdict for the plaintiffs, against the two defendants, the bus company and Clark, unless the jury accepted the bus company's theory, and Clark's theory, of assumed risk on the part of the plaintiff passengers. The Court authorized the jury to apportion any award in one amount against the bus company and another against Clark, subject again to the prerogative on the part of the jury to find the plaintiffs guilty of contributory negligence. The state court jury returned verdicts totaling $59,000.00 in the wrongful death actions and apportioned the awards 90% against defendant Clark and 10% against the bus company. The bus company paid the judgments awarded against it and Clark's insurance company, American Universal, Respondent here, paid its total policy limits on the judgments.

In 1963, Petitioners instituted this action in the District Court alleging that they were assignees of American Universal's insured, Michael Clark, and sought to recover the difference between the total judgments awarded in the state court and the amount paid under the insurance policy by American Universal and by the bus company. The complaints in the District Court charged that insurance company counsel acted adversely to the insured, Clark, by injecting in the state court

trial the issue of assumed risk on the part of the passengers, and further alleged that insurance company counsel was guilty of negligence and bad faith in its conduct of the trial and defense of the Petitioners' claims. The actions of the two Petitioners in the District Court were consolidated (R. 32a) and the Insurance Company in the District Court filed its motion for Summary Judgment supported by an affidavit of counsel, which incorporated the entire Transcript of Record in the civil action in the state court and the entire Transcript of Evidence in the state court trial, consisting of 938 pages. The plaintiffs in the District Court, Petitioners here, likewise filed a motion for Summary Judgment supported by the affidavit of counsel and of the insured, Michael Clark. The District Court conducted a hearing on the Motions for Summary Judgment of the respective parties and determined that further evidence in the form of the deposition of Clark's personal attorney, Hon. Frank E. Haddad, Jr., be taken and made a part of the record. In the subsequent arguments before the District Judge and in the extensive brief filed by the plaintiffs, Petitioners here, counsel vigorously insisted that *as a matter of law* the insurance company's motion for Summary Judgment should be overruled and "that a Summary Judgment should, on the contrary, be awarded these plaintiffs". The District Court concluded, as each party had contended, that there was no issue of fact and that the action might appropriately be disposed of by Summary Judgment. (Appendix B, Petitioners Petition for Writ of Certiorari.) The Dis-

trict Court determined that American Universal had been willing and ready to pay its entire policy limits, and further determined that the conduct of the defense of the state court action by insurance company counsel was done in a reasonably skillful, professional manner, and that insurance company counsel exercised good faith in protecting the rights of its insured, and that under Kentucky law, a finding of bad faith or negligence in the conduct of the state court action by insurance company counsel was not justified. The Court thereupon dismissed the complaints.

Petitioners prosecuted an appeal to the United States Court of Appeals for the Sixth Circuit. The relief demanded on that appeal by Petitioners was that the judgment of the District Court be reversed and the case remanded to the District Court with direction to set aside the District Court's judgment in favor of American Universal Insurance Company "and in lieu thereof to direct the Court to enter a judgment in favor of the Plaintiff-Appellants, Detenber and Townsend, Petitioners here, in the amount prayed for in the complaint with interest and costs.

In Petitioner's brief on appeal to the 6th Circuit Court of Appeals, no contention whatever was made that Summary Judgment was improper. The United States Court of Appeals for the Sixth Circuit rendered its opinion February 9, 1967, affirming the judgment of the District Court (Appendix A, Petition for Writ of Certiorari). For the first time in a Petition for Rehearing in the Court of Appeals, Petitioners urged that

there was a genuine issue of material fact and that the District Court should not have granted Summary Judgment. The United States Court of Appeals for the Sixth Circuit overruled the Petition for Rehearing.

ARGUMENT.

1. **Petitioners Should Not be Permitted to Raise in This Court a Point Raised for the First Time on Petition for Rehearing in the Circuit Court of Appeals, That an Issue of Fact Was Presented in the District Court and Summary Judgment Was, Therefore, Improper, Particularly in View of the Fact That in the District Court and Upon Appeal to the Circuit Court of Appeals, Petitioners Took the Position That There Was no Issue of Fact and That Summary Judgment Was Proper and Petitioners Were Entitled to Judgment as a Matter of Law.**

As stated in the Counter Statement of Facts, both parties in the District Court made motions for summary judgment and Petitioners, who were plaintiffs in the District Court, urged the Court in oral argument and by written brief that there was no material question of fact and that Petitioners were entitled to summary judgment. Likewise, in the Circuit Court of Appeals Petitioners made no contention that summary judgment was improperly granted because there was material issue of fact and the relief prayed in the Court of Appeals was that the judgment of the District Court be reversed and the case remanded to the District Court with directions to set aside the judgments in favor of American Universal Insurance Company

and *in lieu thereof to direct the Court to enter a judgment in favor of the Petitioners.*

It has been repeatedly determined that courts of appeal will adhere to the theory of the case pursued in the trial court and will not, as a rule, consider objections resting on a different theory from that upon which the complaining party tried his case below. *Helvering* v. *Wood,* 309 U. S. 344, 84 L. Ed. 796, 60 S. Ct. 551; *McCullough* v. *Cammerer Corporation,* 323 U. S. 327, 89 L. Ed. 273. Contentions not made by plaintiff in the trial court and grounds of recovery not there suggested or urged, are not ordinarily considered. *Thomas* v. *Taylor,* 224 U. S. 73, 56 L. Ed. 673, 32 S. Ct. 403. While it is true that the appellate court is not bound by the trial court's rulings on questions of law, nevertheless, litigants should not be permitted to urge a position in the trial and appellate court, and when an adverse judgment is rendered, then attempt to take a totally different position.

We do not here contend that a summary judgment should be granted merely because both sides move for it. We recognize that an indispensable prerequisite for such a judgment is the absence of a material question of fact. *Hycon Mfg. Co.* v. *H. Koch & Sons* (CA 9), 219 F. 2d 353. The situation where both parties move for a summary judgment does not parallel that where both parties move for a directed verdict; in the latter, each party is held to agree that there is no disputed question of fact and that the case is to be decided upon the law; by contrast, in the former situation, by definition, judgment cannot be granted if there

is a disputed question of fact. *Brawner* v. *Pearl Ass. Co.*, (CA 9), 267 F. 2d 45. *Hughes* v. *Deckard* (CA 5), 267 F. 2d 697, is a typical personal injury action where the District Court granted summary judgment and the Appellate court reversed and remanded because it found that at the very least conflicting inferences were open. In that case, however, the losing party in the trial court did not move for summary judgment and indeed resisted it and appealed to the Circuit Court from the action of the District Court granting summary judgment. In *Chambers & Co.* v. *Equitable Life Ass. Society of the U. S.*, 224 F. 2d 338, both parties moved for summary judgment supported by affidavits and documents and the Court of Appeals upheld and affirmed a summary judgment in favor of the insurance company but commented that the fact that both parties filed and argued motions for summary judgment did not warrant the granting of either motion if the record reflected a genuine issue of fact.

In the case at bar, Petitioners below, moved for summary judgment and undertook to discharge the burden of demonstrating that there was no genuine issue of fact. Petitioners vigorously urged upon the District Court and the Circuit Court of Appeals that there was no genuine issue and that they were entitled to a judgment as *a matter of law*. This Court should not consider an assignment of error which Petitioners failed to call to the attention of the trial court or the Circuit Court of Appeals until after its judgment affirming had been entered, where as such matters do not

concern the jurisdiction of the Court. *McComb* v. *Goldblatt Bros.* (CA 7), 166 F. 2d 386; *Reconstruction Finance Corp* v. *Sun Lumber Co.* (CA 4), 126 F. 2d 731; *Henry B. Walker, Jr.* v. *Felmont Oil Corp.* (CA 6), 262 F. 2d 163; *Bergerson* v. *Minsour* (CA 1) 152 F. 2d 27; *U. S.* v. *Newburg Mfg. Co.* (CA 1), 123 F. 2d 453. While we recognize that this Court has the power to consider a plain error not specified in the interest of justice, only in exceptional cases will the Court review a question not raised in the Court below. *Duignon* v. *U. S.*, 274 U. S. 195, 200, 71 L. Ed. 996, 1,000, 47 S. Ct. 566; *Husty* v. *U. S.*, 282 U. S. 694, 701, 702, 75 L. Ed. 629, 632, 633, 51 S. Ct. 240. There are no exceptional circumstances here. There is no error. The Court of Appeals for the Sixth Circuit recognized that the District Judge was writing with an "Erie pen". It recognized that Kentucky law on the particular issue is currently established and that the highest court of Kentucky has determined "mere errors of judgment are not sufficient to constitute bad faith" and that bad faith is not merely negligence, but implies conscientious doing of wrong and partakes of the nature of fraud.

2. The Opinion of the U. S. Court of Appeals for the Sixth Circuit Does No Violence to Rule 56c, Federal Rules of Civil Procedure and Is Not Contrary to the Decisions of This Court.

Petitioners contend that the decision of the Circuit Court of Appeals violates Rule 56c since, they urge, that the Court of Appeals disregarded inferences that could be drawn from the facts contained in the record before the District Court. They contend that the record reveals a material issue of fact because conflicting inferences existed from the admitted facts. For this reason, they insist that summary judgment should not have been granted. Reference is made by Petitioners to two decisions of this court. *U. S.* v. *Diebold, Inc.*, 369 U. S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 and *White Motor Co.* v. *U. S.*, 372 U. S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696. *Diebold* involved a civil anti-trust suit. This Court concluded that inferences contrary to those drawn by the trial court might be permissible *in that fact situation. White Motor Co.* v. *U. S., supra,* was also a civil anti-trust suit. Therein this Court observed that summary judgment may not be appropriate where motivation and intent play leading rolls.

Petitioners make reference to a 1965 decision of the Kentucky Court of Appeals, *Roehrig* v. *Merchant's and Businessman's Mutual Ins. Co.*, 391 S. W. 2d 369, 371. Counsel imply that this decision changes the law of Kentucky on the subject of "good faith" and they suggest that the *Roehrig* decision in some wise changes or modifies the Kentucky law as determined by the

District Court and by the Circuit Court of Appeals in its opinion.. Both the District Court and the Circuit Court of Appeals recognized that the Kentucky law dealing with the question of good faith on the part of an insurance company is fixed and determined by that Court's decisions in *American Surety Company* v. *J. F. Schneider* and *Harrod* v. *Meridian Mutual Insurance Co.,* 389 S. W. 2d 192. Even a cursory examination of the Kentueky decision in *Roehrig* v. *Merchant's and Businessman's Mutual Ins. Co., supra,* immediately reveals that the Court is and dealing with the definition of "good faith" as that term is used in a Kentucky statute relating to the question of when a civil action shall be deemed to commence.

The Kentucky statute under consideration in *Roehrig,* KRS 413.250 provides

> "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of an action."

The Court of Appeals of Kentucky in construing this statute adopted a definition of good faith as it relates to the issuance of process on the filing of a complaint. The *Roehrig* decision in no wise modifies or changes the Kentucky court's determination and definition of "good faith" as it relates to the actions of an insurance company in dealing with its insured. The District Court and the Circuit Court of Appeals correctly determined that the law of Kentucky on the pointed issue in this litigation has been firmly established.

The District Court, after considering the entire voluminous record of the state court action and having considered the affidavits filed in support of the motions for summary judgment and the deposition of Michael Clark's personal counsel, concluded that there *was no material issue of fact presented* and determined, *as a matter of law,* based on the Kentucky decisions, *supra,* that a finding of bad faith or negligence on the part of an insurance company's counsel was not justified and that, on the contrary, the defense of the insured was conducted in a reasonably skillful and professional manner and that counsel for the insurance company exercised good faith in attempting to protect the rights of its insured, Michael Clark. The Circuit Court of Appeals independently reviewed the entire record before it and considered the findings of fact and conclusions of law made by the District Judge and affirmed his decision.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for American Universal Insurance Company, Respondent, in the matter styled "Pearl Detenber, Administratrix of the Estate of Terry Detenber, Deceased, and Viola B. Townsend, Administratrix of the Estate of Richard Mattingly, Deceased v. American Universal Insurance Company" do hereby certify that I served a true copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the Petitioner on Oct. 19, 1968, by delivering a copy thereof to Raymond C. Stephenson, 310 West Liberty Street, Louisville, Kentucky, 40202, Josephine P. Hughett, 314 Armory Place, Louisville, Kentucky, 40202, and Harry L. Hargadon, 1916 Kentucky Home Life Building, Louisville, Kentucky, 40202, and by depositing a copy of same in a United States mailbox, with first class air mail postage prepaid, addressed to Henry G. Fischer, 1735 De Sales Street, N. W., Washington, D. C., 20036, Counsel of record for the Petitioners.

(s) John P. Sandidge.